BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA SMITH, Claimant, v. CONAGRA FOODS PACKAGED FOODS COMPANY, INC., Self-Insured Employer, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2005-000156** **IC 2005-003158** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 5, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on January 24, 2008. Claimant, Linda Smith, was present in person and represented by Daniel Luker of Pocatello. Defendant Employer, Conagra Foods Packaged Foods Company, Inc., was represented by Thomas Baskin of Boise. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul Rippel of Idaho Falls. The parties presented oral and documentary evidence. This matter was continued for the taking of post-hearing depositions and the submission of briefs and came under advisement on May 15, 2008. It is now ready for decision.

ISSUES

The issues to be resolved are:

1. Whether Claimant's injury of December 8, 2004, should be characterized as either an injury or an occupational disease;

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

3. Whether and to what extent Claimant is entitled to disability in excess of impairment;

4. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;

5. Whether Claimant is totally and permanently disabled;

6. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;

7. Whether ISIF is liable pursuant to Idaho Code § 72-332; and

8. Apportionment under the Carey formula.

ARGUMENTS OF THE PARTIES

Claimant argues that she is totally and permanently disabled due to the combined effects of her left shoulder injury of December 8, 2004, lumbar spine injury of March 12, 2005, pre-existing impairment and other non-medical factors. Pre-existing impairment includes residual effects of bilateral carpal tunnel syndrome (CTS) and leg length discrepancy. Significant non-medical factors include age, education, training and lack of transferable skills. Claimant relies on the opinion of vocational expert, Terry Montague.

Employer asserts that Claimant's permanent disability is less than total. Employer relies on the opinion of vocational expert, Douglas Crum. Employer asserts that Claimant's permanent partial disability is 65%, but that Claimant's industrial injuries of 2004 and 2005 account for no more than one-third of that amount. Employer maintains that Claimant is an appropriate candidate for retraining and/or return to the labor market, but that Claimant has made a personal decision to take early retirement.

ISIF maintains that Claimant has the ability to perform light-medium type work and is not totally and permanently disabled. ISIF further argues that Claimant's pre-existing impairment was not a hindrance to her employment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the January 24, 2008, hearing;

2. Joint Exhibits 1 through 31 and 7A admitted at hearing;

3. The post-hearing deposition of Terry Montague taken by Claimant on February 19, 2008;

4. The post-hearing deposition of Christian Gussner, M.D., taken by Claimant on February 20, 2008; and

5. The post-hearing deposition of Douglas Crum taken by Employer on February 20, 2008.

Objections posed during the depositions of Mr. Montague, Dr. Gussner and Mr. Crum are overruled.

On January 30, 2008, Employer filed a post-hearing Motion to Admit Additional Exhibits. Employer offered records from the Social Security Administration that were requested

during the discovery process but were not delivered to counsel for Employer until the day of hearing and were not offered as exhibits at hearing. Both Claimant and ISIF filed a response to the Motion on February 8, 2008. On April 3, 2008, the Referee issued an order denying Employer's motion pursuant to J.R.P. 10 and because opposing parties had no opportunity to address the proposed additional exhibits prior to the conclusion of hearing.

On April 22, 2008, Employer filed a Motion for Reconsideration of the Referee's April 3, 2008 ruling. Claimant responded on April 18, 2008, and indicated that she did not concur with Defendant's Motion for Reconsideration, but made no objection thereto. ISIF filed an Objection to the Motion for Reconsider on April 29, 2008, to which Employer responded on May 2, 2008.

Employer provided a chronology of their efforts to obtain Claimant's social security records. Employer has established that they acted in good faith, however, after careful review of the additional pleadings and memoranda filed by the parties on this issue, Defendant's Motion for Reconsideration is denied for the reasons articulated in the Referee's order of April 3, 2008.

After having considered all the above admitted evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1944 in Oregon and was raised in Butte, Montana, where she attended school through the 11th grade. She did not complete the 12th grade and has not obtained a GED. She was 63 at the time of hearing. Claimant has resided with her husband in the same home in American Falls for more than 30 years. After dropping out of high school, Claimant attended Butte Business College but discontinued her studies after six months. She knows how to file, but does not have typing or computer skills. Claimant is a strong reader, but

does not have advanced math skills. Claimant worked as a certified nurse's assistant for approximately ten years, beginning in the early 1960s, but has not kept her certification or skills current. She worked in a fast food restaurant for a few months in the early 1960s.

2. Claimant was involved in a motor vehicle accident when she was 15 years old which resulted in multiple fractures of her lower left leg. Initial surgical intervention was not successful and Claimant continued to have problems with her lower left leg for which she has undergone additional surgeries. She has been diagnosed with tibial mal-union. Claimant's left leg is shorter than her right leg as a result of the motor vehicle injury and related treatment. Claimant's left foot symptoms never completely resolved. Medical records reflect pain in the left foot, left knee and left hip in 1997 as well as bilateral hip pain in 2004 associated with altered gait due to leg length discrepancy.

3. Claimant began working for Lamb-Weston[1] in 1975 as a general laborer on the trim line for three months. She then went to the flake line which was very heavy work but allowed her to secure a day shift position which fit better with her family schedule. While working on the flake line, Claimant ran the drums, fixed additives, kept potatoes in grade and shoveled mash. Claimant was required to handle 40 pound bags of flake and 50 pound bags of flour. She sealed and palletized bags for a hyster to move. Claimant eventually developed bilateral CTS as the result of shaking the bags of flake which prompted Claimant to change from the flake line to a package operator position.

4. As a package operator, Claimant was required to move quickly and lift 40 pound cases. Claimant's transition to the package operator position helped her hands, but she

[1] Claimant went to work for Lamb-Weston and continued to work at the same plant. The ownership of the plant changed to Employer during the course of Claimant's employment. Claimant refers to Employer as Lamb-Weston and some references in this decision to Employer may actually refer to Employer's predecessor, Lamb-Weston.

eventually underwent bilateral CTS releases by S. Angier Wills, Jr., M.D. (right on August 11, 2003 and left on September 9, 2003). Dr. Wills described the outcome as "excellent." Claimant felt that the CTS surgeries were successful and eliminated her pain but she continued to have weakness in the hands as well as difficulty with fine manipulation. She requires assistance when handling small nuts and bolts. In April 2004, Dr. Wills assigned an 11% whole person permanent partial impairment (PPI) rating for bilateral CTS. Dr. Wills advised Claimant to avoid "hard repetitive work."

5. In September 2000, Claimant sustained an industrial injury to her left groin as the result of lifting poly-roll with a co-worker. In March 2001, Claimant sustained an industrial injury to her lower back as the result of lifting a double filled case with 80 pounds of product. Claimant reported both injuries to employer, but did not lose significant time from work following either injury. Claimant testified that her lower back symptoms resolved with conservative care, but that she tried to reduce the amount of heavy lifting she performed at work through self accommodation.

6. On December 8, 2004, Claimant injured her left shoulder as the result of raking totes with a heavy steel rake. Claimant initiated treatment with J. Warren Willey, D.O. She was diagnosed with a thoracic strain on December 27, 2004, and maintained her regular work status.

7. Claimant continued to experience left shoulder pain and was given a steroid injection on January 20, 2005, by Dr. Willey. Dr. Willey's subsequent report reflects that Claimant's shoulder condition resolved. Claimant disagrees that her shoulder condition resolved, and explained that Dr. Willey focused on her back injury of March 2005 and declined to treat her for both injuries at the same time.

8. On March 12, 2005, Claimant was working swing shift when the line on her

packing machine backed up with multiple areas full of product. Claimant quickly removed several cases and felt pain in her lower back while doing so. She reported the injury to Employer and sought treatment with Dr. Willey. Claimant underwent a normal course of conservative treatment, without improvement. A lumbar MRI revealed a disc herniation and degenerative changes. Claimant was referred to spine surgeon Clark H. Allen, M.D., for evaluation.

9. Dr. Allen evaluated Claimant in June 2005. He concluded that Claimant's disc herniation at L4-5 and stenosis were directly related to the March 2005 work injury and not the result of a natural progression of degenerative changes. Flexion and extension x-rays revealed instability and Dr. Allen recommended a lumbar fusion. Claimant underwent surgery on July 22, 2005, in the form of a fusion from L4 through S1. Post operative physical therapy was initiated. Claimant's left shoulder problems flared up after her back surgery and delayed her recovery from back symptoms.

10. In September 2005, Dr. Allen referred Claimant to Kenneth E. Newhouse, M.D., for evaluation and treatment of Claimant's left shoulder complaints. Dr. Newhouse previously evaluated Claimant in the mid 1990s for bilateral hand pain. He diagnosed left shoulder bone-on-bone arthrosis with the possibility of a rotator cuff injury. Claimant's left shoulder condition did not improve with conservative treatment and Dr. Newhouse performed a total left shoulder replacement on January 18, 2006.

11. In December 2005, Dr. Allen opined that Claimant would reach MMI with regard to her lower back in July 2006, one year post-operatively. He concluded that Claimant's underlying degenerative disease was aggravated by the industrial injury. Dr. Allen anticipated that Claimant would be able to return to sedentary type office work but not to her pre-injury job.

12. Claimant attempted to return to work in a limited capacity following her back

injury of March 2005, but was physically unable to do so. Claimant testified that she did not have physical concerns or limitations prior to December 2004. Claimant was terminated by Employer, pursuant to company policy, after she was off of work for a year. She has not returned to work for any employer since early 2005. During 2004, Claimant earned approximately $25,000 working for Employer.

13. Claimant intended to work for Employer until she retired in 2010 at age 65, but decided to retire in 2005 because she was physically unable to return to her prior position. She does not have a current resume and last interviewed for a job in 1975. She has not applied for work because she does not "see that there's anything out there that I physically can do that I would want to." Transcript, p. 62, Ll. 20-22. Claimant was approved for Social Security disability benefits but changed to regular Social Security retirement benefits in 2007, when she turned 62.

14. Having met and observed Claimant at hearing and reviewed the evidence, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

15. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

16. **Occupational Disease vs. Accident.** The issue of whether Claimant's injury of December 8, 2004, should be characterized as an occupational disease or accident was raised at the outset of hearing by Employer and included as a disputed issue by the agreement of the parties. It is undisputed that Defendant has accepted compensability for the 2004 injury. No

party offered argument relating to this issue and no party has asserted that such a distinction is necessary or relevant to the outcome of the other disputed issues. This issue is deemed waived and will not be further addressed in this decision.

17. **Causation.** It is undisputed that Claimant's bilateral CTS and leg length discrepancy pre-existed Claimant's industrial injuries of 2004 and 2005. It is further undisputed that Claimant sustained an industrial injury to her left shoulder on December 8, 2004, and to her lower back on March 12, 2005. Claimant's left shoulder condition was aggravated at the time Claimant underwent lumbar surgery on July 22, 2005, secondary to post-surgical positioning of her left shoulder. Claimant has not sustained an intervening injury to either her left shoulder or lower back. It is undisputed that Claimant had pre-existing degenerative changes to her left shoulder and lower back and that Claimant sustained previous injuries to her lower back. These conditions were aggravated by the industrial injuries of 2004 and 2005. There are no pending disputes regarding payment of medical bills or apportionment of PPI. Accordingly, there is not a true causation dispute, but rather a dispute as to the extent to which Claimant's permanent disability is related to her various pre-existing conditions. This dispute will be discussed in subsequent paragraphs.

18. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Thus the foundation of permanent disability is impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422.

"Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424.

19. Claimant herein was evaluated in July 2006 by physical medicine and rehabilitation specialist Christian G. Gussner, M.D., and neurosurgeon R. Tyler Frizzell, M.D., (the Panel) at the request of Employer. The Panel reviewed Claimant's medical records, performed a physical examination of Claimant, issued a report and responded to multiple letters of clarification. They addressed Claimant's impairment attributable to her various injuries and conditions and provided permanent work restrictions. All PPI ratings assigned were based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

20. The Panel opined that Claimant's PPI rating of her lumbar spine is 22%, with 12% PPI attributable to pre-existing degenerative changes and 10% attributable to the March 2005 industrial injury.

21. The Panel opined that Claimant's PPI rating of her left shoulder is 13%, with 10% PPI attributable to pre-existing degenerative arthritis and 3% attributable to the December 2004 work injury.

22. The Panel agreed with the methodology utilized by Dr. Wills in determining that Claimant's PPI attributable to her bilateral CTS is 11%. However, the Panel recorded different range-of-motion measurements and opined that Claimant's PPI is 3% for bilateral CTS, without apportionment. The Panel's 3% impairment rating for Claimant's CTS is adopted as a more current application of the same methodology.

23. The Panel opined that Claimant's PPI attributable to her pre-existing leg length

discrepancy is 3%. Claimant did not have pre-existing PPI attributable to her left hip or left foot.

24. As determined by the Panel, Claimant suffers permanent impairment of 41% of the whole person, including 10% impairment attributable to her March 2005 back injury, 3% impairment attributable to her December 2004 left shoulder injury, and 28% impairment attributable to her various pre-existing conditions.

25. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

26. Claimant herein alleges she is totally and permanently disabled. To evaluate

Claimant's permanent disability several items merit examination including the physical restrictions resulting from her permanent impairments and her potential employment opportunities as identified by vocational rehabilitation experts.

27. Restrictions. The Panel categorized Claimant's ability to work in the light-medium category. They assigned permanent restrictions of 35 pound maximum lifting on an occasional basis; 20 pounds lifting on a repetitive basis; no repetitive bending, twisting or torquing of the low back; ability to alternate positions as needed; no lifting above chest-height with the left arm; no forceful, repetitive gripping activities; no repetitive wrist movements; no forceful or repetitive activities involving the left leg and no prolonged low frequency vibrations.

28. The Panel indicated that, based on the pre-2005 medical records pertaining to Claimant's low back complaints, Claimant would have reasonably been under medium duty restrictions before the March 2005 injury consisting of a 50 pound maximum lifting capacity on an occasional basis; a maximum of 20 pounds repetitive lifting; no bending, twisting, or torquing of the low back; no prolonged low frequency vibration and with the ability to modify positions as needed.

29. Claimant underwent a functional capacity evaluation (FCE) in March 2007, at the direction of David Burstedt, MPT. He concluded that Claimant could perform physical tasks at the light physical demand level. She should avoid low level and overhead activities, but she should be able to perform many tasks at waist level, given appropriate breaks. Claimant is able to lift and/or carry 30 pounds occasionally, 20 pounds frequently and 10 pounds constantly.

30. Dr. Gussner testified in his post-hearing deposition that the results of the FCE were consistent with the restrictions determined by the Panel and would appropriately be relied upon. He clarified that he defines "repetitive" as more than two-thirds of the work shift with

regard to hand and wrist movement. For example, Claimant could use a keyboard for up to two-thirds of an eight hour shift.

31. Vocational Evidence. Claimant was referred to the Industrial Commission Rehabilitation Division (ICRD) in December 2005 by Employer. Les Sorensen was the initial vocational field constant assigned to the case. As of December 2005, Employer was holding Claimant's position open and had light-duty work available. However, Claimant was not released to work in December 2005 and underwent shoulder surgery in January 2006. In January and early February 2006, Claimant told Sorensen that she intended to retire. Sorensen explained that the services of ICRD would not be beneficial if Claimant was going to retire and indicated he would close his file.

32. Claimant contacted Sorensen in late February 2006 to request that services of ICRD be continued and explained that she had changed her mind about retiring. Sorensen agreed to stay on the case. However, Sorenson retired from ICRD in April 2006 and Claimant's case was reassigned to Delyn Porter. Porter scheduled an appointment with Claimant at her home on June 29, 2006, but Claimant was not home at the time of the appointment. Porter contacted Mark Love with Employer who indicated that he had been unsuccessful in his efforts to contact Claimant and was uncertain about her return-to-work plans. Porter stopped by Claimant's house on August 16, 2006, but she was not at home. He left his business card and a note requesting that Claimant contact him to schedule an appointment. He sent a follow up letter to Claimant on September 27, 2006, to which Claimant responded on October 10, 2006.

33. Porter met with Claimant on October 24, 2006, and Claimant expressed a willingness to participate in vocational services but was a no-show for a scheduled appointment on November 2, 2006. Claimant subsequently failed to respond to three phone messages and a

contact letter in November 2006. ICRD closed its case in December 2006 based on inability to establish contact with Claimant. Claimant described the situation as phone-tag and testified that Porter was out of the office on the occasions that she attempted to reach him by phone.

34. Porter identified potential job titles that would be appropriate for Claimant based on her education, transferable skills, labor market and age. He identified food packaging worker, packaging operator, warehouse associate, process equipment line operator and production line.

35. Terry Montague, M.A., is a vocational rehabilitation consultant hired by Claimant. He earned a master's degree in sociology and previously worked as a field consultant and office manager for ICRD. He met with Claimant in the fall of 2006 and prepared a case assessment and vocational evaluation in April 2007. He concluded that there were no suitable employment opportunities available which Claimant could perform or be trained to perform and have a reasonable expectation of competing in an open labor market. Claimant's local labor market includes American Falls, Pocatello and Chubbuck, with which Montague is familiar. He felt that it would be futile for Claimant to seek gainful employment and predicted that she would be found totally and permanently disabled under the odd-lot doctrine. Montague relied on review of medical records, vocational information and his own labor market analysis. He noted that many sedentary or light jobs were unavailable to Claimant because of her limited education and lack of transferable skills; that Claimant lacks clerical or customer service experience; that Claimant is an older worker; and that Claimant had been out of the labor market for two years. Montague disagreed with the appropriateness of job titles identified by Porter because they did not take into consideration Claimant's medical stability, permanent impairment or restrictions. Montague provided an addendum report in May 2007, in which he confirmed that Claimant's total and permanent disability was the result of pre-existing conditions, non-medical factors and

the March 2005 injury.

36. Douglas N. Crum is a vocational rehabilitation consultant hired by Employer. He is a certified disability management specialist and former ICRD consultant/supervisor. Crum reviewed medical records and vocational information, including the report of Montague. He interviewed Claimant in September 2007. He relied on permanent restrictions assigned by the Panel and felt that the FCE generally confirmed the restrictions assigned by the Panel. Crum concluded that Claimant has a light-medium physical capacity with some additional restrictions regarding repetitive use of her upper extremities, need to change positions, rotation of the low back and exposure to low frequency vibration. He opined that Claimant is employable in a competitive labor market, but that job positions identified by Porter were probably not appropriate. Crum identified appropriate job titles of hotel desk clerk, food/parts delivery driver, patient sitter, switchboard operator, receptionist or cashier. He testified that with a small amount of computer related training Claimant would have significantly greater access to the jobs identified.

37. Crum compared the physical restrictions identified by the Panel for Claimant's pre-March 2005 condition with her permanent restrictions following the March 2005 injury. He concluded that the March 2005 injury had minimal impact on Claimant's restrictions and that the only changes in her restrictions were a reduction in lifting capacity from 50 pounds on an occasional basis to 35 pounds on an occasional basis and no lifting above chest level with the left upper extremity.

38. Crum's perception of Claimant's presentation is different from that of Montague. Crum perceived Claimant as bright and articulate, whereas Montague commented that Claimant was not consistently able to communicate using full sentences and viewed her social skills in a

less favorable light. Crum noted that Claimant is an avid reader and that her handwriting is legible. Claimant's work with Employer demonstrated that she is intelligent and adaptable enough to learn new skills. Crum opined that Claimant is not totally and permanently disabled pursuant to the odd-lot doctrine. He agreed that Claimant's labor market includes American Falls and Pocatello. Crum estimated Claimant's permanent disability at 65%, inclusive of her permanent impairment, with one-third of the disability attributable to her industrial injuries of 2004 and 2005. Claimant's pre-injury job as a package operator was categorized as medium-heavy work, but Claimant performed the job with some self-accommodation and likely performed medium duty work.

39. Based on Claimant's total impairment rating of 41% of the whole person, her permanent work restrictions and inability to return to her time of injury occupation and considering her non-medical factors, including her age, lack of formal education, limited transferable skills in sedentary and light occupations, Claimant's ability to engage in gainful activity has been significantly reduced. The Referee concludes the disability rating of 65%, inclusive of her permanent impairment, assigned by Mr. Crum is supported by the evidence and adopted.

40. Odd-lot. A claimant who is not 100% permanently disabled may still prove total permanent disability by establishing he or she is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a

superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

41. A claimant may satisfy his or her burden of proof to establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;

2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or

3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

42. Claimant herein has not attempted to obtain employment beyond a brief return to modified duty work soon after the injury and did not attempt alternate employment. The evidence fails to establish that Claimant, or anyone acting on her behalf, has searched for alternate employment without success.

43. There are conflicting opinions as to whether efforts to find suitable work for Claimant would be futile. It is undisputed that Claimant is not able to return to her pre-injury employment as a packing operator. However, the medical opinion of the Panel establishes that Claimant has an ability to perform at least light duty work, albeit with restrictions and limitations. This opinion is bolstered by the FCE performed in March 2007. There are no medical opinions regarding Claimant's ability to return to work that are contrary to the restrictions provided by the Panel/FCE. Montague is of the opinion that Claimant's efforts to return to work would be futile. However, Montague acknowledged that if the FCE restrictions are applicable, then Claimant is not totally permanently disabled. Dr. Gussner later opined that

the results of the FCE were consistent with the Panel's findings. Crum disagrees with Mr. Montague and concludes that Claimant is employable in a light-medium capacity.

44. Claimant sincerely believes that she is not employable and has an understandable reluctance to invest time or energy into seeking employment and/or retraining in light of the fact that she is nearing her target retirement age of 65. The vocational opinion of Mr. Crum is more persuasive that the opinion of Mr. Montague regarding Claimant's employability. The medical evidence and FCE establish that Claimant is able to perform light-medium duty work and the vocational opinion of Mr. Crum establishes there is employment available to Claimant in the Pocatello labor market that is compatible with Claimant's abilities. Claimant has not proven she is totally and permanently disabled by either the 100% method or the odd-lot doctrine.

45. **ISIF Liability**. Inasmuch as Claimant has not proven she is totally and permanently disabled, ISIF bears no liability pursuant to Idaho Code § 72-332.

46. **Carey Apportionment.** The issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), is moot.

47. **Idaho Code 72-406 apportionment.** Idaho Code § 72-406 (1) provides that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

48. Claimant has pre-existing physical impairments totaling 28% of the whole person including impairments to her lumbar spine (12% attributable to degenerative changes), left shoulder (10% attributable to degenerative arthritis), wrists (3% attributable to bilateral CTS), and left leg (3% attributable to leg length discrepancy).

49. In spite of these impairments, Claimant performed rigorous full-time work for many years until her final industrial accident. The reality of Claimant's situation was that she did not work with any restrictions or limitations to her lower back other than being more careful about heavy lifting following her 2001 lumbar injury. Claimant's current restrictions regarding the lower back are closely related to her lumbar fusion surgery which was necessitated by the March 2005 injury. Although there is some amount of pre-existing impairment attributable to Claimant's pre-injury degenerative changes to both her back and left shoulder, the impact of pre-existing impairment on her disability is less than has been attributed by Mr. Crum. Claimant's permanent disability should be apportioned to her pre-existing conditions only to the extent of her 28% pre-existing physical impairment.

CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent partial disability of 65% inclusive of her 41% permanent partial impairment.

2. Claimant has not proven she is totally and permanently disabled by either the 100% method or the odd-lot doctrine.

3. Defendant ISIF is not liable pursuant to Idaho Code § 72-332.

4. Claimant's permanent partial disability should be apportioned to her pre-existing conditions pursuant to Idaho Code § 72-406 only to the extent of her 28% pre-existing permanent physical impairment.

5. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 27th day of August, 2008.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor
Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LINDA SMITH, Claimant, v. CONAGRA FOODS PACKAGED FOODS COMPANY, INC., Self-Insured Employer, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2005-000156** **IC 2005-003158** **ORDER** Filed September 5, 2008

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven she suffers permanent partial disability of 65% inclusive of her 41% permanent partial impairment.

2. Claimant has not proven she is totally and permanently disabled by either the 100% method or the odd-lot doctrine.

3. Defendant ISIF is not liable pursuant to Idaho Code § 72-332.

4. Claimant's permanent partial disability should be apportioned to her pre-existing conditions pursuant to Idaho Code § 72-406 only to the extent of her 28% pre-existing permanent physical impairment, resulting in 38% PPD from the industrial injury.

5. All other issues are moot.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 5th day of September, 2008.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

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ka _/s/_____